



DEPARTMENT OF THE NAVY  
OFFICE OF THE ASSISTANT SECRETARY  
(RESEARCH, DEVELOPMENT AND ACQUISITION)  
1000 NAVY PENTAGON  
WASHINGTON DC 20350-1000

SEP 26 2011

MEMORANDUM FOR DISTRIBUTION

SUBJECT: Change 08-9 to the Navy Marine Corps Acquisition Regulation Supplement (NMCARS)

The attached document identifies changes incorporated in the April 2008 edition of NMCARS which are effective immediately. The online version of NMCARS will reflect these changes shortly.

The point of contact for NMCARS is Evelyn Ortiz at telephone (703) 614-9640 or email [evelyn.ortiz@navy.mil](mailto:evelyn.ortiz@navy.mil).

A. H. Coetzee  
CAPT, SC, USN  
Executive Director  
DASN(AP)

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SUBJECT: Change 08-9 to the Navy Marine Corps Acquisition Regulation Supplement  
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Incorporate the following changes into the April 2008 NMCARS:

1. Technical amendments are made throughout the NMCARS to reflect an organizational alignment that renames “Deputy Assistant Secretary of the Navy for Acquisition and Logistics Management (DASN(A&LM))” to “Deputy Assistant Secretary of the Navy for Acquisition and Procurement (DASN(AP))” as authorized by ASN(RD&A) memorandum for distribution of June 21, 2011. Consequently, the acronym “DASN(A&LM)” is changed to “DASN(AP)” throughout the NMCARS. Additionally, under SUBPART 5201.1—DEFINITIONS, section 5202.101 (DFARS 202.101) Definitions is revised to reflect the organizational alignment, as follows:

## **SUBPART 5202.1—DEFINITIONS**

### **5202.101 (DFARS 202.101) Definitions.**

\* \* \* \* \*

“DASN(AP)” means the Deputy Assistant Secretary of the Navy for Acquisition and Procurement, Office of the Assistant Secretary of the Navy (Research, Development, and Acquisition). It also includes the Executive Director, DASN(AP), and the Director, Program Analysis and Business Transformation (PABT), DASN(AP).

2. Under PART 5203 IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST, add SUBPART 5203.2-- CONTRACTOR GRATUITIES TO GOVERNMENT PERSONNEL and sections 5203.201 Applicability, 5203.204 Reporting suspected violations of the Gratuities clause, and 5203.204 Treatment of violations to specify DON policy and procedures pursuant to 10 U.S.C. § 2207, FAR Subpart 3.2, and the Gratuities clause in FAR Subpart 52.203-3, as follows:

## **SUBPART 5203.2--CONTRACTOR GRATUITIES TO GOVERNMENT PERSONNEL**

### **5203.201 Applicability.**

This subpart establishes procedures pursuant to 10 U.S.C. § 2207, FAR Subpart 3.2, and the Gratuities clause in FAR 52.203-3. These procedures are not intended to be the exclusive remedy that would preclude or limit otherwise appropriate criminal or civil action under the United States Code, administrative action, disciplinary action under the Uniform Code of Military Justice, or contractual action, including termination, for any other appropriate reason.

### **5203.203 Reporting suspected violations of the Gratuities clause.**

(a) Within two working days after receiving information indicating that a gratuity (including, but not limited to, entertainment or a gift) may have been offered or given by a contractor or a contractor’s agent or representative to any officer, official, or employee of the Government to obtain a DON contract or favorable treatment in the awarding, amending, or making of determinations concerning the performance of a DON contract, a



DON officer, official, or employee must inform the Assistant General Counsel (Acquisition Integrity) (AGC (AI)) and the contracting officer having cognizance over the contract of the potential infraction, unless the contracting officer is suspected to be a party to the gifted or offered gratuity. In that case, the HCA should be informed instead of the contracting officer. Information provided to the AGC (AI) and the cognizant contracting officer or HCA is exempt from Management Information Collection (MIC) reporting requirements as per SECNAV M-5214.1 (Dec. 2005), Part IV, § 7.n. & Part V, § 5.p. Submit the information in the format prescribed at Annex 10.

(b) The contracting officer having cognizance over the contract implicated in the alleged Gratuities clause violation (or the HCA, if the contracting officer is alleged to be a party to the gifted or offered gratuity) must:

(i) Within five working days after receiving information regarding an alleged violation of the Gratuities clause, provide a written report to the AGC (AI) (exempt from Management Information Collection (MIC) reporting requirements as per SECNAV M-5214.1 (Dec. 2005), Part IV, § 7.n. & Part V, § 5.p), including:

(A) The name and address of the contractor;

(B) A summary of any information concerning the suspected violation known to the person making the report, such as the nature and amount of the alleged gratuity and the person to whom it was allegedly offered or given;

(C) The contract number, date, estimated day of completion of performance, a general description of supplies or services procured, dollar amount, status of performance and payment, urgency of requirements, availability of the supplies or services from other sources, and the name of the contracting officer; and,

(D) Copies of any documents available concerning the suspected violation.

(ii) Cooperate and coordinate with the AGC (AI) and the DON's Acquisition Integrity Office (AIO) in the investigation and treatment of an alleged violation, including, but not limited to, responding promptly to requests for information.

(iii) Advise AIO of the existence and status of any administrative investigation concerning the alleged violation of which the contracting officer is aware, with an estimated date upon which the report of investigation will be completed, if known. If requested, a copy of the report of investigation must be provided to AIO as soon as practicable.

(iv) Comply fully with DFARS Subpart 203.070 "Reporting of violations and suspected violations."

(c) AIO must refer the alleged violation to the Naval Criminal Investigative Service for investigation and other appropriate action pursuant to SECNAV INSTRUCTIONS 5430.107, dated 28 Dec 2005, and 5430.92B, dated 30 Dec 2005, or successor instructions or regulations. AIO may also refer the alleged violation to the Naval Audit Service pursuant to SECNAV INSTRUCTION 5430.92B, dated 30 Dec 2005, or successor instruction or regulation.

(d) The reporting procedure set forth in this Subpart 5203.203 is not exclusive. The AGC (AI) may commence a proceeding pursuant to Subpart 5203.204 concerning a



suspected violation of the Gratuities clause involving any DON contract regardless of the source of the information.

**5203.204 (FAR 3.204) Treatment of violations.**

(a) General.

(i) Authority to provide notices, conduct hearings, and make findings of fact and conclusions of law concerning alleged violations of the Gratuities clause, including whether a violation of the Gratuities clause has occurred, has been delegated to the AGC (AI), without power of redelegation.

(ii) The AGC (AI) must make recommendations to the Deputy Assistant Secretary of the Navy (Acquisition and Procurement) (DASN(AP)) with respect to terminating the contractor's right to proceed under the contract and assessing exemplary damages.

(b) If the AGC (AI) has determined that a violation has occurred, authority to determine whether to terminate the contractor's right to proceed under the contract, and, if so, whether to assess exemplary damages and in what amount, has been delegated to DASN(AP).

(c) To the extent practicable, the AGC (AI) will make findings of fact, conclusions of law, and recommendations to DASN(AP) before the initiation of any debarment proceeding against the contractor concerning the same conduct. See FAR Subpart 9.4.

(d) *Notification.*

(i) If the AGC (AI) determines that there is credible evidence that a violation of the Gratuities clause has occurred, he or she may commence a proceeding pursuant to this Subpart by providing written notice to the contractor alleged to be liable for the purported violation.

(ii) The notification advising the contractor of the alleged Gratuities clause violation must:

(A) Describe the suspected violation in sufficient detail to reasonably apprise the contractor of the alleged violation;

(B) State the potential penalties for a violation of the Gratuities clause;

(C) State that the contractor may obtain a copy of the entire evidentiary record (with the exception of redactions made to protect personally identifiable information, such as social security numbers, dates of birth, and financial account numbers), subject to the payment of the reasonable cost of any transcript, by written request made to the AGC (AI). Upon the contractor's written request, the AGC (AI) must advise the contractor of the general nature of any redacted information;

(D) Inform the contractor that it may refute the allegations set forth in the notice. The contractor may refute the allegations and provide in person, in writing, or through one or more representatives any information the contractor wishes to have considered concerning penalties for a violation of the Gratuities clause. The contractor may submit documentary evidence and arguments. If the contractor requests a hearing, at that hearing, the contractor may confront any person the DON presents on the matter and present witnesses at the contractor's own expense;



(E) State that the contractor has thirty calendar days from receipt of notice to submit written matters refuting the allegations and to request a hearing. Any timely submissions by the contractor will become part of the evidentiary record; and,

(F) Advise the contractor that if a hearing is requested, a list of any witnesses the contractor wishes to present and a concise statement of each witness's relevance to the hearing must be delivered to the AGC (AI) or other person designated by the AGC (AI) no later than five calendar days after the AGC (AI) grants the hearing request.

(iii) The AGC (AI) must ensure that the notice to the contractor is delivered by hand or sent by registered or certified mail, or another, similar commercial means.

(e) *Hearing.*

(i) The AGC (AI) will schedule any hearing for a date not later than fifteen calendar days after the AGC (AI)'s receipt of the contractor's request, unless the contractor requests a later date not to be more than thirty days after the AGC (AI)'s receipt of the hearing request. The AGC (AI) may grant the request for a later date if the AGC (AI) determines that the request is reasonable. The AGC (AI) will inform the contractor by email of the hearing date, if the contractor so requests and provides an email address for that purpose when requesting a hearing.

(ii) Hearings will be conducted at the offices of the AGC (AI) or other location designated by the AGC (AI) as follows:

(A) Hearings will be as informal as practicable, consistent with principles of fundamental fairness, and non-adversarial in nature.

(B) The DON will be represented by one or more attorneys from the Office of the General Counsel.

(C) The AGC (AI) and the DON representative(s) may ask questions of the contractor or its representatives making the presentation.

(D) The contractor or its representatives and the DON's representatives will have an opportunity to present information relevant to the facts at issue, including witness testimony. If jointly requested by the contractor and the DON, the AGC (AI) may permit a witness to appear by videoconference or other electronic means rather than in person. Witnesses will be sworn in and reminded of the official nature of the proceeding and that they are subject to criminal prosecution for any false testimony. Witnesses are subject to cross-examination. The AGC (AI) may ask questions of any witness.

(E) Documents and testimony not ordinarily admissible under legal rules of evidence may be received subject to the discretion of the AGC (AI) and will be given appropriate weight. The AGC (AI) may exclude from the evidentiary record irrelevant, immaterial, or unduly repetitive information presented by the contractor or the DON.

(iii) A verbatim transcript of the hearing must be made and will become part of the evidentiary record. Additional documentary materials or comments the AGC (AI) permits the contractor or the DON to submit at or following the hearing must become part of the evidentiary record. Any materials permitted to be submitted after the hearing by the contractor or the DON representative(s) must be provided on the same day to the AGC (AI) and the DON representative (s) or the contractor, as applicable. The contractor or the DON, as applicable, must have five business days from receipt to submit



comments to the AGC (AI) on any permitted post-hearing submissions made by the other party.

(f) *Findings, conclusions, and recommendations.*

(i) The AGC (AI) must make all findings of fact and conclusions of law relevant to whether a violation of the Gratuities clause occurred, including the dollar value of any gratuity, and all findings of fact, conclusions of law, and recommendations relevant to whether the contractor's right to proceed under the contract should be terminated, and, if so, whether an assessment of exemplary damages is appropriate and in what amount. These findings, conclusions, and recommendations must be based on the preponderance of the evidence found in the evidentiary record. The decision of the AGC (AI) as to whether a violation of the Gratuities clause has occurred will be the DON's final decision.

(ii) If the contractor does not timely request a hearing, the AGC (AI) must make the findings of fact, conclusions of law, and recommendations on the basis of the written record.

(iii) The AGC (AI) may permit the contractor and the DON to submit proposed findings of fact, conclusions of law, and recommendations by the date specified by the AGC (AI). The AGC (AI) also may require the contractor and the DON to submit stipulated findings of fact and conclusions of law.

(iv) The AGC (AI) will issue a written decision no more than 60 days after the later of the completion of the hearing or the AGC (AI)'s receipt of all documentary submissions. If the AGC (AI) concludes that the Gratuities clause was violated, the decision must include the findings of fact and conclusions of law that the AGC (AI) relied upon and the findings, conclusions, and recommendations relevant to whether the contractor's right to proceed under the contract should be terminated, and, if so, whether an assessment of exemplary damages is appropriate and in what amount.

(vi) If the AGC (AI) determines that a violation of the Gratuities clause occurred, he or she must submit the evidentiary record and his or her written decision to DASN(AP).

(g) *Contract Actions.*

(i) DASN(AP) will determine whether to terminate the contractor's right to proceed under the contract, and, if so, whether to assess exemplary damages and in what amount. The decision of DASN(AP) will be the final decision of the DON with respect to whether to terminate the contractor's right to proceed under the contract, and, if so, whether to assess exemplary damages and in what amount. DASN(AP) will reach a decision within 45 calendar days after receipt of the evidentiary record and written decision of the AGC (AI).

(ii) Written notice of the decision of DASN(AP), together with the written decision of the AGC (AI), must be provided to the contractor promptly by hand delivery, registered or certified mail, or other similar commercial means.

3. Under the Annex section, add Annex 10—Notice of Suspected Violations of the Gratuities Clause, to standardize the reporting of information under 5203.203(a), as follows:

**ANNEX 10 – NOTICE OF SUSPECTED VIOLATIONS OF THE  
GRATUITIES CLAUSE**

As required by NMCARS 5203.203(a), provide a written notice of suspected violations to the Assistant General Counsel (Acquisition Integrity) at:

Assistant General Counsel (Acquisition Integrity)  
Department of the Navy  
720 Kennon Street SE  
Bldg 36, Rm 214  
Washington Navy Yard, DC 20374

Include the following information in the notice:

1. Name and contact information of the person reporting
2. Name of Contractor(s)
3. Contract Number (if known) or other information known about the contract, including subject matter and place of performance
4. Name and location of Government employee(s) involved with the suspected gratuity offered or provided
5. Brief summary of information or events known regarding the suspected gratuity offered or provided (including nature, amount, and/or fair market value of the suspected gratuity, if known)
6. How the information was obtained, if relevant